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## AN AMBIGUITY IN THE NEGOTIABLE INSTRUMENTS LAW.

**W**HEN it is considered how carefully the Negotiable Instruments Law has been examined by critics,<sup>1</sup> and how long the practical working of the Act has been tested, it may seem odd to discover now an ambiguity in a section of the statute which involves a question arising every week in the business of every large bank. But such a discovery emphasizes the difficulty under which the draftsman of a statute labors in attempting to foresee all questions that may arise and in expressing clearly the rule which he wishes to have enacted.

A section of the Negotiable Instruments Law which has recently been found to be either ambiguous or to mean something which bankers have not suspected until recently is section 85. This section is as follows:

“Section 85. Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. *Instruments falling due on Saturday are to be presented for payment on the next succeeding business day*, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.”<sup>2</sup>

The words in the section which have been italicised are those to which the following discussion relates; they are contained in the Draft as recommended by the Commissioners of Uniform State Laws, and have been adopted in the law as enacted in most of the states.<sup>3</sup>

<sup>1</sup> See the articles by Professor Ames, 14 HARV. L. REV. 241, 442, and the article by Mr. McKeehan, 41 Amer. Law Reg. N. S. 437, 439, 561. These articles together with defenses by Judge Brewster on the points criticized are reprinted in Professor Brannan's work on the Negotiable Instruments Law.

<sup>2</sup> This section is numbered as section 145 in the New York Statute, and in Mr. Crawford's book which reprints the statute as enacted in New York. It is enacted in the Massachusetts Revised Laws as Section 102 of Chapter 73.

<sup>3</sup> In a few states changes have been made. Arizona, Kentucky, and Wisconsin omit the clause altogether. In Colorado the following words have been substituted:

It has been the practice of banks at least in the cities of New York and Boston, since the enactment of the Negotiable Instruments Law, to present on the following Monday all notes or bills whose date of maturity falls on Saturday. No presentment of such paper has been made, customarily, on Saturday. The propriety of this procedure was called in question in a case which arose not long ago in Boston. A large issue of interest-bearing notes of a railroad company was held by a trust company. By their terms these notes matured on Saturday and were payable at a specified bank in Boston. On the Saturday when the notes matured the railroad company had on deposit in the bank, where the notes were payable, sufficient funds for their payment. The notes were not presented until the following Monday, and when presented interest was demanded to the day of presentment. The bank, however, declined to pay interest for the interval between Saturday and Monday.

By the provisions of the Negotiable Instruments Law<sup>1</sup> where an instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor, and further, by another section,<sup>2</sup>

"If the instrument is by its terms payable at a special place and he [the person primarily liable] is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part."

It was claimed by the bank at which the notes in question were payable, that the notes were due on Saturday and that the presence of funds in the bank where the notes were payable operated as

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"Instruments falling due on any day, in any place where any part of such day is a holiday are to be presented for payment on the next succeeding business day." In New York the year after the enactment of the Negotiable Instruments Law the words "or becoming payable" were inserted after the words "falling due." This change has been copied in Kansas. In Massachusetts this clause of the statute as originally passed was identical with the draft recommended by the Commissioners on Uniform State Laws, but the Commissioners who prepared the Revised Laws of Massachusetts inserted the words "or payable" after the words "falling due," and the New Hampshire statute has followed the form of the Massachusetts Revised Laws. The insertion of the words "becoming payable," or "or payable," seems to have been made on the assumption that the words "falling due" meant something other than "becoming payable." This assumption seems unfounded.—See Mr. Crawford's note to section 145 of his book on the Negotiable Instruments Law.

<sup>1</sup> Section 87; Crawford's Neg. Inst. Law, § 147; Mass. Rev. Laws, c. 73, § 104.

<sup>2</sup> Section 70; Crawford's Neg. Inst. Law, § 130; Mass. Rev. Laws, c. 73, § 87.

a tender of payment and therefore stopped the running of interest. The large amount of the notes involved made the question of interest for even two days one of consequence, but even more serious cases may be supposed involving the same question. A note maturing on Saturday may be held by a bank for collection for a correspondent. In accordance with the custom which has been prevalent the collecting bank would make no presentment until Monday. It may be supposed that on Saturday the note would have been paid had presentment been made, but that owing to supervening bankruptcy, or other cause, the note is dishonored when presented on Monday. If the note was legally due on Saturday the collecting bank has been guilty of negligence and is liable to its correspondent. The same question may be raised in determining when a right to interest accrues upon a note which matures on Saturday, and which does not bear interest according to its terms.

The case of the railroad notes alluded to above was submitted to the counsel both of the railroad and of the trust company. The lawyers consulted agreed in the opinion that the trust company was not entitled to interest after the Saturday on which the notes matured. In support of this conclusion it was pointed out that by the terms of the Negotiable Instruments Law<sup>1</sup> presentment for payment is not necessary to charge the maker, and that the provisions in regard to presentment seem to relate to the steps necessary for charging indorsers and other persons secondarily liable. Furthermore, if it had been the intent of the statute to make a note maturing on Saturday for all purposes like a note maturing on Monday, the second sentence of section 85 would probably have been framed so as to read "when the day of maturity falls upon Saturday or Sunday, or a holiday, the instrument is payable on the next succeeding business day." The contrast between the words "*when the day of maturity* falls upon Sunday or a holiday" as used in the second sentence of the section with the words in the third sentence, "*Instruments falling due on Saturday,*" is a strong indication that the words "falling due" mean something other than having the day of maturity fall upon Saturday. That is, the words do not mean as the words in the preceding sentence do, falling due according to the literal tenor of the instrument, but according to its legal effect. A slight additional argument also may be built upon the failure to mention Saturday

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<sup>1</sup> Section 70; Crawford's Neg. Inst. Law, § 130; Mass. Rev. Laws, c. 73, § 87.

in a subsequent section of the Act which provides that "Where the day, or the last day, for doing any act herein required or permitted to be done falls on a Sunday or on a holiday, the act may be done on the next succeeding secular or business day."<sup>1</sup>

On the other hand it was urged on behalf of the trust company that the uniform custom of banks, since the enactment of the Negotiable Instruments Law, had been to treat instruments maturing on Saturday as if they were payable on Monday. The anomaly was also strongly urged of regarding a note as dishonored by the maker so far as his own liability was concerned on Saturday, when, so far as the liabilities of parties secondarily liable was concerned, the maker had not dishonored the note, and could not dishonor it until Monday. An action brought against the maker on Monday morning would then not be premature, though so far as the indorsers were concerned the maker had not yet dishonored the note. The law merchant prior to the Negotiable Instruments Law certainly contained no precedent warranting such a result. The practical inconvenience which would follow from the construction given by counsel to the statute was also noticed. If that construction is sound every instrument falling due on Saturday and bearing indorsements must be presented on Monday in order to charge the indorsers, but in order to start interest running, and in order to make sure that no chance of securing payment is lost, presentment must also be made on Saturday, if the instrument is by its terms payable at a particular place.

Though the question is not free from doubt, since clear language must be required to justify a result which is certainly an anomaly in the law of negotiable paper, yet on the whole the construction given by the eminent counsel consulted in the matter seems sound. The opinion of Mr. Crawford is in conformity with this view, although he does not seem to have perceived the anomalous result of not only authorizing but requiring presentment for payment in order to charge indorsers on a day other than that on which the instrument was legally due.<sup>2</sup>

The legal situation in regard to the matter caused such uneasiness to certain bankers in Boston that the question was presented by the Clearing House Committee to their counsel, who gave the following opinion:

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<sup>1</sup> Section 194; Crawford's Neg. Inst. Law, § 5; Mass. Rev. Laws, c. 78, § 210.

<sup>2</sup> Crawford's Neg. Inst. Law, 3 ed., p. 110, § 145, note (a).

"The language of the statute is not clear, and until it has been construed by the Supreme Court of this Commonwealth we think that the only safe course for a bank to pursue, which holds a note falling due on Saturday, is to present it for payment on Saturday, so as to protect itself from any claim for negligence by the holder, if the bank at which it is payable should have funds applicable to its payment on that day. If payment is refused on Saturday, the collecting bank should present it again for payment on Monday so as to charge the indorsers, who are entitled to a presentment on that day."

In consequence of this opinion the Clearing House Committee instructed their counsel to prepare an amendment to the law with a view to make it both free from ambiguity and in conformity with banking custom. Accordingly in the present session of the Massachusetts Legislature the section under discussion has been amended so that the portion relating to instruments falling due on Saturday reads as follows:

"When the day of maturity falls upon Saturday, Sunday or a holiday, the instrument is payable on the next succeeding business day which is not a Saturday. Instruments payable on demand may at the option of the holder be presented for payment before 12 o'clock noon on Saturday when that entire day is not a holiday; provided, however, that no person receiving any check, draft, bill of exchange, or promissory note payable on demand shall be deemed guilty of any neglect or omission of duty or incur any liability for not presenting for payment or acceptance or collection such check, draft, bill of exchange or promissory note on a Saturday; provided, also, that the same shall be duly presented for payment or acceptance or collection on the next succeeding business day."<sup>1</sup>

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<sup>1</sup> Chap. 417.